APPEAL NO. 041589
FILED AUGUST 23, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on June 9, 2004. With respect to the single issue before him, the hearing officer determined that the appellant/cross-respondent (carrier) is entitled to a 58% reduction of the respondent/cross-appellant's (claimant) impairment income benefits and/or supplemental income benefits based on contribution from an earlier compensable injury. In its appeal, the carrier asserts error in the hearing officer's determination that it is entitled to 58% contribution, arguing that 100% contribution should be awarded. In her cross-appeal, the claimant argues that the proper contribution percentage is either 13% or, alternatively, that no contribution should be awarded. The claimant also asserts error in the admission of Carrier's Exhibit G. The appeal file does not contain a response from the claimant to the carrier's appeal. In its response to the claimant's cross-appeal, the carrier argues that the appeal is untimely. In the alternative, the carrier contends that the contribution percentage should not be reduced below the 58% figure ordered by the hearing officer.

DECISION

Affirmed.

Initially, we consider whether the claimant's cross-appeal was timely filed. Pursuant to Section 410.202(a), a written request for appeal must be filed within 15 days of the date of receipt of the hearing officer's decision. Section 410.202 was amended effective June 17, 2001, to exclude Saturdays, Sundays, and holidays listed in Section 662.003 of the Texas Government Code from the computation of the 15-day period in which to file an appeal. Section 410.202(d). Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(e) (Rule 143.3(e)) provides that an appeal is presumed to have been timely filed if it is mailed not later than the 15th day after the date of receipt of the hearing officer's decision and received by the Texas Workers' Compensation Commission (Commission) not later than the 20th day after the date of receipt of the hearing officer's decision.

Commission records indicate that the hearing officer's decision was mailed to the claimant on June 15, 2004. In her appeal, the claimant states that because June 20, 2004, was a Sunday, she was deemed to have received the hearing officer's decision on Monday, June 21, 2004. However, the deemed date of receipt did not roll over to Monday as the claimant contends. Rule 102.3(b) states that "a working day is any day, Monday-Friday, other than a national holiday as defined by Texas Government Code, Section 662.003(a) and the Friday after Thanksgiving Day, December 24th and December 26th. Use in this title of the term 'day,' rather than 'working day' shall mean a calendar day." Rule 102.5(d) states:

> For purposes of determining the date of receipt for those written communications sent by the Commission which require the recipient to perform an action by a specific date after receipt, unless the great weight of the evidence indicates otherwise, the Commission shall deem the received date to be five days after the date mailed; the first working day after the date the written communication was placed in a carrier's Austin representative box located at the Commission's main office in Austin as indicated by the Commission's date stamp; or the date faxed or electronically transmitted.

In accordance with Rule 102.3(b) the use of the term "day" in Rule 102.5(d) for the calculation of the deemed date of receipt after mailing as opposed to "working day" means that receipt is deemed five calendar days after mailing, or on June 20, 2004, in this instance. Based on the June 20, 2004, deemed date of receipt, the claimant's appeal, had to be filed by Friday, July 9, 2004. The claimant's cross-appeal was mailed and faxed to the Commission on Monday, July 12, 2004, and is, therefore, untimely.

We find no merit in the carrier's argument that the hearing officer erred in ordering contribution in the amount of 58%. The carrier contends that had the claimant's 13% impairment rating (IR) for her _____, injury been converted to a rating under the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides 4th edition) it would have been a 10% rating in accordance with Diagnosis-Related Estimate (DRE) Lumbosacral Category III for radiculopathy. The claimant was awarded a 10% IR under DRE Lumbosacral Category III for the current compensable injury. Thus, the carrier contends that it should be entitled to 100% contribution because the IRs for both injuries would have been a 10% under the AMA Guides 4th edition. In its appeal, the carrier contends that "there was no basis for the Hearing Officer to find the carrier was only entitled to 50% impairment rating [sic], when faced with identical ratings for the exact same condition." The carrier's argument that there is no basis for the hearing officer's decision to award 58% contribution is puzzling in light of the fact that the 58% contribution figure came from the report of Dr. S, the carrier's peer review doctor, who recommended that percentage of contribution. Rather than converting the claimant's 13% IR for her 1999 compensable injury, which was comprised of 7% for specific disorders and 6% for loss of lumbar range of motion, to a AMA Guides 4th edition rating as the carrier contends he should have done, Dr. S decided to determine the claimant's IR for her current compensable injury under the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides 3rd edition) in order to make the comparison. Dr. S determined that the claimant would have been assigned a 13% rating for specific disorders under the AMA Guides 3rd edition for her current injury; thus, he recommended 58% contribution based on the comparison of the 7% specific disorder rating for the 1999 injury to the 13% rating she would have received had her 2001 compensable injury been rated under the AMA Guides 3rd edition. We find nothing in the 1989 Act or the Commission rules that prohibited Dr. S from converting

the current IR to a AMA Guide 3rd edition rating rather than converting the IR for the 1999 compensable injury to a AMA Guides 4th edition rating. We believe that he had the discretion to do whichever he believed was most appropriate in order to make a meaningful comparison of the claimant's IRs possible and to recommend a contribution percentage. The hearing officer herein awarded contribution in accordance with the evidence presented by the carrier on that issue. We simply cannot agree that he erred in doing so.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **FIDELITY & GUARANTY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
701 BRAZOS STREET, SUITE 1050
AUSTIN, TEXAS 78701.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

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Edward Vilano
Appeals Judge